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### COMMENTARY

#### Pleau-Sharing

JONAH J. HORWITZ<sup>†</sup>

Federalism is a hot topic at the moment. With the Supreme Court having just ruled on the most significant conflict between the states and the national government since the New Deal,<sup>1</sup> the issue has greater currency with the public than it has had in decades. As with many such debates, however, the struggle over healthcare reform is not really about federalism. The Commerce Clause has simply provided a convenient constitutional garb for advocates on all sides. By and large, such advocates do not purport to be centrally motivated by a concern for states' freedom from national interference. Rather, they talk about the freedom of the individual (the law's critics), the needs of the indigent (the law's defenders), and fiscal responsibility (both). That is not to say that the healthcare debate is a sham. No doubt a healthy discussion can be had over the constitutional balance of power between the states and the federal government, even when the combatants' motivations have more to do with other matters. Perhaps the passions of the participants sharpen the constitutional debate. Indeed, perhaps some considerations that seem removed from the relationship between the nation and the states are actually not so removed.<sup>2</sup>

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1. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012).

2. *See, e.g., Dennis v. Higgins*, 498 U.S. 439, 447 (1991) (holding that the commerce clause affords individuals a cause of action against states interfering with their right to engage in interstate commerce).

Nevertheless, there are surely times when a conversation about federalism should be focused on *federalism*, times when we should return to the roots of the concept and revisit the fundamental question of what powers are granted to which sovereign. Such conversations are most fruitfully had about powers traditionally reserved to one government and encroached upon by another. For in that instance, unlike cases where courts wrestle with uniquely modern activity that does not fit neatly into the historical federalist paradigm,<sup>3</sup> we can clearly see the evolution of our federalist system, and we can thoughtfully consider whether or not we like the direction we are headed.

There are few areas more traditionally dominated by one sovereign over the other than the prosecution of commonplace crimes.<sup>4</sup> And there are few judicial decisions that more blithely disregard that tradition than the recent First Circuit decision, *United States v. Pleau*.<sup>5</sup> The majority opinion in that case is a stark reminder of just how far the conventional distinctions between the sovereigns have collapsed. It is also a stark reminder of how such collapses can occur almost invisibly, through erosion and passing remarks rather than landmark cases and seminal holdings.

Some cursory background. In 2010, Jason Pleau robbed and murdered a gas station manager who was making a bank deposit in Rhode Island.<sup>6</sup> While in state custody for a parole violation, a federal grand jury indicted him for robbery affecting commerce and use of a firearm during and in relation to a crime of violence resulting in death.<sup>7</sup> The federal government sought custody of Pleau to charge him with the offenses, which potentially carried with them a penalty of death.<sup>8</sup> Because Lincoln Chafee, the Governor of

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3. See, e.g., *United States v. Hornaday*, 392 F.3d 1306, 1311 (11th Cir. 2004) (applying commerce clause jurisprudence to the Internet).

4. See, e.g., *Scheidler v. Nat'l Org. for Women, Inc.*, 547 U.S. 9, 20 (2006) (“[R]espondents’ Hobbes Act interpretation broadens the Act’s scope beyond what case law has assumed. It would federalize much ordinary criminal behavior, ranging from simple assault to murder, behavior that typically is the subject of state, not federal, prosecution.”).

5. *United States v. Pleau*, 680 F.3d 1 (1st Cir. 2012) (en banc).

6. *Id.* at 3.

7. *Id.*

8. *Id.* The federal government has since announced it will seek the death penalty for Pleau. See Katie Mulvaney, *State of R.I. Seeks U.S. Supreme Court*

Rhode Island, is opposed to capital punishment, he refused to hand Pleau over.<sup>9</sup> By the time the case reached the First Circuit, *Pleau* involved a host of complicated jurisdictional and procedural issues that are not centrally relevant to this commentary.<sup>10</sup> Its reference to the principal concern examined here—the increasing, and increasingly surreptitious, federalization of ordinary criminal prosecution—is mentioned only in passing. Which is, in a sense, exactly the point.

Here is the passing remark. The majority opinion, written by the eminent jurist Judge Boudin for himself and two other members of the *en banc* court, announced: “That there is an overriding federal interest in prosecuting defendants indicted on federal crimes needs no citation . . . .”<sup>11</sup> In a scholarly opinion published in a high-profile case for a respected court and by a prominent judge, it is no small matter to declare that a proposition does not require any authority. It is puzzling, therefore, that Judge Boudin would find it unnecessary to support this proposition, which is far from self-evident.

As an initial matter, it is important to note that this essay does not purport to answer the dispositive questions at issue in the dispute between the United States and Rhode Island, or those at issue in the dispute between the majority and the dissent. Those questions entail complex matters of statutory analysis and habeas jurisprudence too thorny to untangle in the short space allotted. And, in any event, it is clear that the concern articulated here cannot resolve the controversy. For, as observed below, even the dissent does not dispute the proposition quoted above and critiqued here. That too is part of the very problem under consideration: that even a scathing dissent written to defend state sovereignty in one narrow case accepts without comment a wildly sweeping condemnation of state

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*Review in Pleau Death Penalty Case*, PROVIDENCE J. (Aug. 21, 2012), <http://news.providencejournal.com/breaking-news/2012/08/state-seeks-us.html>.

9. *Pleau*, 680 F.3d at 3.

10. Many of the issues relate to the Interstate Agreement on Detainers, a compact between the separate states and the federal government concerning the exchange of prisoners between different jurisdictions. *See id.* at 3-5.

11. *Id.* at 7.

sovereignty in a much broader context. The problem, in a nutshell, is one of *tone*.

"That there is an overriding federal interest in prosecuting defendants indicted on federal crimes" is a freestanding proposition on a high level of generality.<sup>12</sup> Judge Boudin, a careful drafter, included within the sentence no indication that it bore any close connection to the legal issues in the case at bar. He did not say, "there is an overriding federal interest in prosecuting defendants indicted on federal crimes in a dispute over the terms of the Interstate Agreement on Detainers" or "in a dispute over the proper application of habeas law." With presumed calculation, he said simply that "there is an overriding federal interest in prosecuting defendants indicted on federal crimes."<sup>13</sup> Period. The assumption that Judge Boudin meant what he said as he said it is further bolstered by the fact that he saw fit to announce the lack of authority, and confirmed by the fact that the dissent tacitly treated the statement as an abstract (and true) proposition, rather than a necessary building-block of the majority's flawed reasoning.

Now, in a different case, it could very well be true that the proposition is so obvious as to render a citation superfluous. Imagine, for example, a criminal defendant complaining to an assistant U.S. attorney that he should not be forced to answer for his offense because he had parental obligations, spousal obligations, or business obligations. Then it would make sense to respond, scoffingly, that an overriding federal interest eclipsed his own. Or, to bring the matter slightly closer to plausibility, imagine an elected official urging a federal judge to dismiss an indictment because it would impair his ability to serve the people. The judge would likely be on firm ground to shoot the motion down, because there is an overriding federal interest in seeing corrupt politicians removed from office and punished.

But what exactly does it mean for there to be an overriding federal interest in transplanting a single, fairly unremarkable defendant from a state prison to a federal prison? The only explanation with any persuasive force is

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12. *Id.*

13. *Id.*

that different penalties will be available to Pleau's federal prosecutors than to Rhode Island. Indeed, that is the Governor's stated reason for declining the federal request in the first place: that he does not believe in the death penalty, and that the Department of Justice could pursue one if it so chooses. It is difficult to see, however, how the federal government's interest in seeing Pleau, the robber and murderer of a gas station manager, die by the hand of an executioner carrying out a federal death sentence rather than die during or after a lengthy stay in a state prison, could meaningfully be described as overriding, let alone how it could be described as such in passing and with no authority. Nor can it be ignored that the federal government very seldom executes *anyone* in today's day and age<sup>14</sup> and generally reserves the punishment for the perpetrators of truly egregious offenses.<sup>15</sup> If there is any proposition in the opinion that required a citation, it would be this one!

Ultimately, Judge Boudin cannot really mean "[t]hat there is an overriding federal interest in prosecuting defendants indicted on federal crimes" in such a way as to be applicable to Pleau. What he must mean instead, in keeping with the tenor of the increasing federalization of run-of-the-mill crimes, is that there is an overriding federal interest in the federal government calling the shots in Pleau's prosecution, rather than Rhode Island and regardless of what Rhode Island would presumably do to him. In other words, there is an overriding federal interest in a federal attorney (not a state attorney) charging Pleau under federal statutes (not state statutes); and a federal interest in a federal judge (not a state judge) sentencing him to a federal prison (not a state prison). It matters not that the process and end result would likely be very similar. The point is that the federal government is the federal government. If it wants Jason Pleau, it gets him.

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14. See, e.g., Michele Martinez Campbell, *Federalism and Capital Punishment: New England Stories*, 36 VT. L. REV. 81, 81 (2011) ("Federal death sentences represent only 0.53% of death sentences imposed in the United States.").

15. Timothy McVeigh, for instance, one of the men responsible for the Oklahoma City bombing, was one of the last people executed by the federal government. See FED. BUREAU OF PRISONS, *Executions of Federal Prisoners (Since 1927)*, <http://www.bop.gov/about/history/execchart.jsp> (last visited Sept. 19, 2012).

Again, this critique is not meant to attack the result reached by the First Circuit. The case law may support the majority, and more importantly the Constitution may. It is hard to challenge Judge Boudin's assertion that the "Supremacy Clause operates in only one direction and has nothing to do with comity."<sup>16</sup> Maybe that fact alone is sufficient to justify the outcome. But, to borrow the Judge's own phrase, that proposition has nothing to do with the federal government's interests, overriding or not. On the contrary, it is essentially a way of saying that *it doesn't matter* whether the federal government has an overriding interest. All it needs is to pretend it has one, to say: we want Pleau, give him to us.

Interestingly, the vigorous dissent penned by Judge Torruella and joined by Judge Thompson accuses the majority of "unnecessary federal arrogance" but cites for its charge the majority's line about the Supremacy Clause running in only one direction, not its fabrication of an overriding federal interest.<sup>17</sup> The majority's view of the Supremacy Clause may be arrogant; it also happens to be accurate. Its view of the overriding federal interest, on the other hand, is both arrogant and untrue. One wonders whether the dissent here is implicitly conceding the fact that it makes no difference whether the federal government has an overriding interest in Pleau. After all, the dissent does not counter the majority's claim of an overriding federal interest; it simply rebuts its reading of the law. There is certainly nothing improper in Judge Torruella's tack in that regard. The duty of a dissenting judge is to express his reasoning for why he disagrees on the result, and reasoning in the majority not necessary for the result is reasoning that does not demand a response.

Still, one wishes for honesty if nothing else. If we have reached the point where the federal government can seize a prisoner from a state on a flimsy pretext that flies in the face of history, practice, and common sense, our Article III judiciary should so inform us. We have a right to know the current status of our constitutional system, particularly when it seems to have shifted so dramatically in an area—criminal law—of crucial importance to all society. A petition for certiorari in *United States v. Pleau* has already been

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16. *Pleau*, 680 F.3d at 6.

17. *Id.* at 12 n.17 (Torruella, J., dissenting).

filed with the Supreme Court, and the case is therefore at the court's doorstep.<sup>18</sup> Relatively free as it is from the fierce ideological emotions at play in the healthcare litigation, it will hopefully provide the high court an opportunity to tell us where we stand, for good or ill.

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18. See *Pleau v. United States*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/pleau-v-united-states/> (last visited Oct. 18, 2012).